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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 109.

CITY OF YONKERS and JOHN W. TOOLEY, Jr., as
President of Committee of Yonkers Commuters, etc.,

Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION and THE NEW YORK
CENTRAL RAILROAD COMPANY.

MOTION TO SHORTEN TIME FOR ISSUANCE OF MANDATE.

JOHN J. BRODERICK,

Corporation Counsel,

City of Yonkers,

Its Attorney.

Dated: January 19, 1944.

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JR., as President of Committee of
Yonkers Commuters, etc.,

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v.

THE UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION and
THE NEW YORK CENTRAL RAILROAD
COMPANY.

MOTION TO SHORTEN TIME FOR ISSUANCE OF MANDATE.

Now comes the City of Yonkers, appellant in the above entitled cause, and respectfully moves that the time for the issuance of the mandate of the Court in this case be shortened to January 25th, 1944, for the following reasons:

1. The defendant, New York Central Railroad Company, made an application on August 20th, 1942, under Section 1 (18) of the Interstate Commerce Act, to abandon its Yonkers Branch (R. 10-30). That Division 4 of the Commission issued its order dated March 20th, 1943, certifying that the present and future public convenience and necessity permitted said abandonment (R. 78-79). This Order dated March 20th, 1943, provided that the Order

become effective within forty (40) days thereafter, or on April 29th, 1943. The effective date of the Order was subsequently postponed until May 29th, 1943. This extension of the effective date of the Order was due to the fact that the appellants, City of Yonkers and John W. Tooley, Jr., as President of the Committee of Yonkers Commuters, etc., and the Public Service Commission of the State of New York, petitioned for reconsideration of the Commission's Order and for a rehearing. These petitions were denied (R. 110). An action was instituted by the appellants and the New York Public Service Commission to enjoin this Order (R. 1). While this action was pending, the effective date of the Order was further postponed until June 12th, 1943, at the request of the District Court.

2. As required by the statutes, a Statutory Court, consisting of three Judges, after hearing the case on the merits on June 10th, 1943, rendered its opinion and judgment adjudging the Commission's Order valid. (R. 385). After the rendition of this judgment the Public Service Commission of the State of New York decided to go no further and the Appellants, City of Yonkers and John W. Tooley, Jr., as President of the Committee of Yonkers Commuters, etc., decided to assume the burden of the appeal to the Federal Supreme Court. The Statutory Court of the District Court reconvened after the rendition of its judgment and upon motion of the Appellant, City of Yonkers, granted a temporary stay so that an application could be made to the Federal Supreme Court for a stay pending appeal to this Court. The stay by the Statutory District Court was until June 19th, 1943. (R. 388). The Appellants on June 16th, 1943, the Federal Supreme Court not then being in session, made an application for a stay to Mr. Justice Jackson. Mr. Justice Jackson held the application open

until it could be considered by the full Court. On June 21st, 1943, the full Court denied the stay; also denied the motion of the United States to affirm and noted probable jurisdiction. Purporting to act under the Order^o of the Interstate Commerce Commission, which was declared invalid by this Court, the Defendant, New York Central Railroad Company, discontinued service on June 30th, 1943, leaving the rails and other parts of the abandoned line intact.

3. Since June 30th, 1943, and up to the present time, namely January 19th, 1944, service on this line has been discontinued. This illegal abandonment and discontinuance of service means that for a period of approximately six and one-half months four stations along the abandoned line in the City of Yonkers have been closed, namely, Caryl, Lowerre, Park Hill and Getty Square. These stations have been closed since June 30th, 1943, and are still closed and discontinued in direct violation of Section 54 of the Railroad Law of the State of New York, as amended, (Chapter 49 of the New York Consolidated Laws). The closing of these stations has affected the orderly processes of life of a large proportion of the people of the City for they have depended for many years in a large measure on the railway service furnished by the railroad which the Defendant, New York Central Railroad Company, has abandoned under an invalid order. The Interstate Commerce Commission has this to say in its order for a rehearing dated January 12th, 1944:

"It appearing, That the Supreme Court of the United States on January 3, 1944, in its opinion in City of Yonkers et al., v. United States of America et al., No. 109, October Term, 1943, held the certificate of public convenience and necessity issued herein on March 20, 1943, to be invalid because of the absence of requisite jurisdictional findings,"

That the number of residents of the City of Yonkers which the City claims will be affected by this order is some 38,264. (R. 270-271). It also proved without contradiction at the previous hearings that the abandonment would cause a diminution of real property value of \$2,790,125. (R. 248.) At a hearing held in the early part of this month before the Public Service Commission of the State of New York in this matter, it was admitted by responsible officials of the New York Central Railroad Company, and it is in the record there, that the Defendant, New York Central Railroad Company, could resume service on its abandoned line within approximately a week after the issuance of a mandate out of this Court so that if the mandate did issue in due course on or about January 28th, 1944, service on the abandoned line could be restored within approximately one week according to the testimony of these New York Central Railroad officials. The number of cars which would have to be put in service on the abandoned line or the number of employees required to man the line was ruled out by the Hearing Commissioner as irrelevant. It is apparent that there is a division of opinion in the Federal Supreme Court as to whether this Yonkers Branch is an electric railroad within or without Section 1 (22) 49 U. S. C. for in the prevailing opinion, at the top of page 4, written by Mr. Justice Douglas, there is a statement:

"The Commission itself has noted that in the 'construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways.' Annual Report (1928), p. 80. That difficulty is apparent here by the division of opinion which exists in the Court whether this Yonkers branch is an 'interurban electric' railway which is 'operated as a part' of the New York Central system. Sec. 1 (22)."

The New York Central Railroad Company in its motion to enlarge, states at page 4 that "a temporary restoration of service would not be in the public interest". There is nothing to indicate that the restoration will be only temporary.

4. It is apparent that in the City of Yonkers, as in other communities, by reason of the Federal regulations in relation to the restriction of the use of rubber for tires and gasoline that the bus transportation system is acute and the busses are crowded. (See affidavit of Sheldon L. Pollock, Transportation Administrator for the City of Yonkers, N. Y., verified June 1, 1943 (R. 371-372). It is imperative that all transportation facilities be made available to the citizens of Yonkers at once. This is particularly true of the Yonkers Branch of the Defendant, New York Central Railroad Company, which has been abandoned since June 30th, 1943, which carried before the abandonment 600 passengers (each way) daily.

It is apparent from the foregoing that the City of Yonkers and its citizens have been deprived of service over the Yonkers Branch for a period of approximately six and one-half months under an invalid order without recourse, unless any damage suffered by this abandonment is actionable.

5. Rule 34 of this Court states that a mandate will issue as of course after the expiration of twenty-five days from the date the judgment was entered. That will be on or about January 28th, 1944, unless the time is shortened or enlarged by the Order of this Court. As stated above, the prevailing opinion indicates that there is a division of opinion as to whether the railroad in question here is an "interurban electric railroad", which is "operated as a

part" of the New York Central Railroad System. It may be that another invalid order may be issued by the Interstate Commerce Commission. In that event, the discontinuance of service might be for a longer period than six and one-half months under an invalid order as is the situation in this case or until the matter was adjudicated. The abandonment of this railroad is in absolute violation of Section 54 of the New York State Railroad Law, set out in Exhibit "A" appended herein.

6. It is, therefore, in the public interest that the mandate of this Court be shortened to January 25, 1944, and that the public interest involved as to the City of Yonkers and its inhabitants is more particularly set forth in the affidavit of William A. Walsh, City Manager of the City of Yonkers, in behalf of the said City of Yonkers, your movant herein, hereto appended as Exhibit "B".

WHEREFORE, the City of Yonkers prays that the time for the issuance of the mandate of this Court be shortened to January 25th, 1944, and the motion of the New York Central to enlarge be denied.

Respectfully submitted,

JOHN J. BRODERICK,
Corporation Counsel,
City of Yonkers,
Its Attorney.

Dated: January 19, 1944.

Exhibit A.

"Sec. 54. NOTICE OF STARTING TRAINS; NO PREFERENCES.
 *** No station established by any railroad corporation for the reception or delivery of passengers or property, or both, shall be discontinued without the consent of the commission having jurisdiction first had and obtained. ***

(Section 54 of the Railroad Law as amended (Chapter 49 of the New York Consolidated Laws.))

Exhibit B.

STATE OF NEW YORK }
 COUNTY OF WESTCHESTER }

WILLIAM A. WALSH, being duly sworn, deposes and says:
 That he is the City Manager and Chief Executive of the City of Yonkers, New York.

Individually as a long time resident of the City of Yonkers and in his official capacity he is deeply interested and concerned with the general welfare of the City of Yonkers and its inhabitants.

That the present population of the City of Yonkers is approximately 142,000.

That for the past fifty-five years and up until June 30, 1943, a line of railroad, which is now electric, ran through the City of Yonkers from its southerly boundary to its northern termini at Getty Square, Yonkers, New York.

That on the said 30th day of June, 1943, this line was abandoned by the New York Central Railroad under color of an order issued by the Interstate Commerce Commission.

That along the line which was abandoned four stations were maintained by the New York Central Railroad Company:

That these stations were known and named as Caryl, Lowerre, Park Hill and Getty Square.

That the line carried over 600 passengers (each way) daily at the time that the New York Central Railroad Com-

pany made its application to the Interstate Commerce Commission for its certificate.

That the City of Yonkers claimed at the original hearing before the Examiner for the Interstate Commerce Commission that the population by the abandonment affected would be 38,204 in the year 1940.

That the number, therefore, affected, if the figure of 38,204 is accepted, would be over one-fourth of the entire population of the City of Yonkers.

That as developed at the hearing, without contradiction, the valuation of the property in the area affected would decrease approximately \$2,790,125.00.

That in addition to the discontinuance of this service for over 600 passengers (each way) daily and the diminution of real estate values in the City of Yonkers there is also this fact which must be taken into consideration, namely the over-crowding of all means of transportation especially street cars and busses in the City of Yonkers as evidenced by the affidavit of the War Transportation Administration of the City of Yonkers (R. 371-372).

That in the general public interest and in the interest of the City of Yonkers and its inhabitants every available means of transportation should be maintained in the City of Yonkers now and there should be no curtailment of service.

That it naturally follows that the 600 passengers who used the Yonkers branch prior to its abandonment now have to find other methods of transportation and all of these methods of transportation now used by them are over-crowded.

That in my opinion as City Manager and Chief Executive of the City of Yonkers the motion for the enlargement of the time for the issuance of the mandate herein should be denied and the motion of the City of Yonkers to shorten the time for the issuance of the mandate herein should be granted.

WILLIAM A. WALSH.

Sworn to before me this)
19 day of January, 1944.)

JAMES F. WHITE,

Notary Public—Westchester County.